Supreme Court, U.S.
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No. 07-949

In the Supreme Court of the United States

ROBERT WHITE, PRO SE,

Petitioner;

v.

JOSEPH B. COLLINS,
Chapter 7 Trustee for
CK LIQUIDATION CORP,

Respondent.

On Petition for a Writ of Certiorari
To the United States Court of Appeals
for the First Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Does 11 U.S.C. §503(b)(1)(A) allow administrative priority of a non-executory software royalty contract, in which the non-debtor is fully performed, when the debtor-in-possession continues selling software permitted under that contract, generating all its $1.5 mil. in post-petition revenue; or, according to the Bankruptcy Court, District Court, and First Circuit Court of Appeals, is a non-executory contract automatically and exclusively categorized as a pre-petition claim and therefore exempt from priority because the contract was negotiated pre-petition?

2. Did Petitioner's non-executory software royalty contract qualify as a property interest in the debtor's assets sold via a non-plan sale conducted pursuant to 11 U.S.C. §§363(b) & (f) and did 11 U.S.C. §363(e) give Petitioner the right to seek declaratory relief "at any time" to establish and protect his property interest; or, according to the Bankruptcy Court, District Court, and First Circuit Court of Appeals, is such a non-executory contract singularly relegated to the status of a pre-petition claim and therefore disqualified as a property interest in the debtor's assets?

3. Was Petitioner entitled to the equitable remedy of specific performance of his non-executory software royalty contract according to 11 U.S.C. §363(f)(5), and as provided under Massachusetts statutory law, because the value of Petitioner's future royalties due

under his contract could not be calculated with certainty; or, according to the Bankruptcy Court, District Court, and First Circuit Court of Appeals, since Petitioner's contract was automatically converted into an unsecured pre-petition claim then none of the protections in 11 U.S.C. §363(f)(1-5) applied to Petitioner's contractual interests in the debtor's assets?

4. When no other provision in 11 U.S.C. §363(f)(1-5) justifies the sale of Petitioner's interest in the debtor's assets, is a stockholder who purchases those assets via a non-plan sale required to abide by the "absolute priority rule" codified under 11 U.S.C. §1129(b)(2)(B)(ii) and pay a fair market price for the assets or make dissenting creditors whole according to the requirement in 11 U.S.C. §363(f)(5) that an "equitable proceeding" govern a §363 sale; or, according to the Bankruptcy Court, District Court, and First Circuit Court of Appeals, does the "absolute priority rule" apply only to a plan of reorganization and not to a §363 sale conducted outside a plan?

5. Is the Fifth Amendment protection against an unjust public taking of private property meant to be embodied within 11 U.S.C. §363(e) and does such a requirement for "adequate protection" prohibit a buyer from purchasing all the debtor's assets for 28% of fair market value when that buyer failed its "good faith" finding under 11 U.S.C. §363(m) after the Bankruptcy Court ruled the buyer committed perjury when testifying about its insider relationship with the debtor? That is, can a perjurious buyer ever satisfy

the public's interest in allowing a Fifth Amendment taking of a creditor's private property interest in the debtor's assets sold via a non-plan sale without the buyer of those assets either paying fair market value or making dissenting creditors whole, and does the debtor have the burden of justifying such a taking under 11 U.S.C. §363(p) ?

6. Did the Bankruptcy Court deprive Petitioner of his US Constitutional Rights to due process and to seek redress of his grievances by enjoining Petitioner from filing further motions without first issuing an order to show cause or holding a sanction hearing prior to issuing its pre-filing injunction, and did Petitioner deserve to be enjoined in the first place; or, according to the Bankruptcy Court, District Court, and First Circuit Court of Appeals, do Petitioner's so-called excessive filings justify the pre-filing injunction?

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PETITION FOR A WRIT OF CERTIORARI

Petitioner, Robert White–Pro Se (hereafter "White"), an unsecured creditor in this bankruptcy appeal, respectfully petitions for a writ of certiorari to review the judgment of the United States court of Appeals for the First Circuit.

OPINIONS BELOW

The judgment of the United States Court of Appeals for the First Circuit was issued on June 29, 2007 [1], affirming the judgment of the United States District Court for the District of Massachusetts, which was issued on August 28, 2006 [2]. The District Court affirmed the Bankruptcy Court's Orders denying White's Motion to Vacate the Sale Order [3] and Motion for Administrative Priority [4]. The District Court also affirmed the Bankruptcy Court's Pre-filing Injunction issued against White [5], each of the Bankruptcy Court Orders entered on May 9, 2006. Neither the Bankruptcy, District, or Circuit Courts published their rulings in this appeal.

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[1] Petitioner's Appendix (hereafter "PA") pgs. 2 - 3.
[2] PA pgs. 5 - 7.
[3] PA pgs. 9 - 16.
[4] PA pgs. 18 - 20.
[5] PA pgs. 22 - 23.

JURISDICTIONAL STATEMENT

The judgment of the First Circuit Court of Appeals was entered on May 29, 2007, and White's Motion for Reconsideration was denied on August 14, 2007 [6]. The jurisdiction of this Court is invoked under 28 U.S.C.§ 1254(l). Pursuant to Supreme Court Rule 29(4)(b) and to 28 U.S.C. §2403(a), White has notified the Solicitor General of the United States that White has raised a "Constitutional Question" that has not yet been certified to the US Attorney General by a United States District or Circuit Court.

FEDERAL STATUTES AND CONSTITUTIONAL ISSUES INVOLVED

11 U.S.C. § 503. Allowance of administrative expenses

> **(b)** After notice and a hearing, there shall be allowed administrative expenses, other than claims allowed under section 502 (f) of this title, including—
> **(1)**

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[6] PA pg. 25 – docket for appeal on PACER web site for the First Circuit Court of Appeals showing the Circuit Court's denial of White's Motion for Reconsideration on August 14, 2007.

(A) the actual, necessary costs and expenses of preserving the estate including—

11 U.S.C. § 363. Use, sale, or lease of property

(e) Notwithstanding any other provision of this section, at any time, on request of an entity that has an interest in property used, sold, or leased, or proposed to be used, sold, or leased, by the trustee, the court, with or without a hearing, shall prohibit or condition such use, sale, or lease as is necessary to provide adequate protection of such interest. This subsection also applies to property that is subject to any unexpired lease of personal property (to the exclusion of such property being subject to an order to grant relief from the stay under section 362).

(f) The trustee may sell property under subsection (b) or (c) of this section free and clear of any interest in such property of an entity other than the estate, only if—

(1) applicable nonbankruptcy law permits sale of such property free and clear of such interest;

(2) such entity consents;

(3) such interest is a lien and the price at which such property is to be sold is greater than the aggregate value of all liens on such property;

(4) such interest is in bona fide dispute; or

(5) such entity could be compelled, in a legal or equitable proceeding, to accept a money satisfaction of such interest.

(p) In any hearing under this section—
(1) the trustee has the burden of proof on the issue of adequate protection; and

The Fifth Amendment to the US Constitution provides in pertinent part:

> No person shall be ... deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

STATEMENT OF CASE

This appeal challenges how a non-executory software royalty contract should be administered under sections 503 and 363 the Bankruptcy Code [7], when the non-debtor (White) is fully performed and the Debtor-in-possession continues to sell software and generate revenue permitted under the contract and then sells its interest in that contract to a buyer of all the assets via a non-plan sale.

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[7] All code citations are to Title 11 of the US Codes unless otherwise indicated.

White filed two separate yet related and nearly simultaneous motions in Bankruptcy Court to establish how his non-executory software royalty Contract (hereafter the "Contract" [8]) should be administered under the Bankruptcy Code. White's first motion [9] sought declaratory relief and/or reversal of the Sale Order [10] to establish that the remaining two years of post-petition royalties due under his Contract survived the non-plan sale and were entitled to specific performance according to §363(f)(5). White also sought to establish that a stockholder must pay a fair market price for the debtor's assets sold at a non-plan sale or make dissenting creditors whole according to the "absolute priority" rule.

White's second motion [11] sought administrative priority for post-petition royalties due under his Contract, pursuant to §503(b)(1)(A), after the Debtor-in-possession generated all of its $1.5 mil. in post-petition revenue from selling software permitted under White's Contract.

White filed his two motions two and a half (2 & ½) years after the Sale Order was ratified. White argued in his Motion to Vacate and at the hearing that the Bankruptcy Court's Sale Order is

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[8] PA, pgs. 26 - 48, White's Contract.

[9] Bankruptcy Court docket #724 – White's Motion to Vacate.

[10] Bankruptcy Court docket #121 – Sale Order.

[11] Bankruptcy Court docket #764 – White's Administrative Priority Application.

void for lack of due process according to Federal Rule of Civil Procedure 60(b)(4) because White had a property interest in the Debtor's assets sold thru the non-plan sale and the Buyer of all the Debtor's assets served faulty notice on White four (4) days prior to the non-plan sale announcing that the Debtor and Buyer were assuming White's Contract[12] when in fact the Debtor and Buyer violated that notice and moved to reject White's non-executory Contract two (2) months after the sale [13], thus violating White's right to due process at the sale by inducing White into believing and acting as though his contractual property interests were not at issue.

The Bankruptcy Court denied all requests in both motions, ruling that royalties due under White's non-executory Contract represented a pre-petition claim, exempt from priority under §503(b)(1)(A) because the Contract was negotiated pre-petition; and, since the Contract converted to a pre-petition claim the Contract did not qualify as a property interest in the Debtor's assets sold pursuant to §§363 (b) & (f). Both the District Court and First Circuit Court of Appeals affirmed all aspects of the Bankruptcy Court's rulings.

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[12] Bankruptcy Court docket #105 - Buyer's Bid & Purchase Agreement, List of Assigned Contracts attached thereto. White's contract is listed as an Acquisition Agreement with the pre-petition Debtor - Baystate Technologies.

[13] Bankruptcy Court docket #230 - Debtor's Motion to Assume and Reject Contracts, Exhibit B attached thereto – Contracts to be Rejected = FastSURF Inc.

In effect, by categorizing White's Contract to be a pre-petition claim, exempt from priority and disqualified as a property interest in the Debtor's assets sold, the Bankruptcy Court and supporting Courts of review allowed the Debtor-in-possession to reject White's non-executory Contract, extinguishing its remaining terms and liabilities, thereby allowing the Debtor to use White's property post-petition and to transfer White's property interest to the Buyer without just compensation or due process of law.

The statutory mistakes in the Courts' decisions on these issues are that: 1) non-executory contracts cannot be rejected under the Bankruptcy Code; therefore, the terms of White's Contract remained valid post-petition as did the Debtor's and Buyer's liabilities under that Contract, 2) the Debtor alone elected to incur a contingent post-petition liability to pay royalties to White by continuing to sell software permitted under White's Contract, which benefited the estate; therefore, White's claim for post-petition royalties met the statutory definition of an administrative claim, 3) nothing in the logic or language of the Bankruptcy Code converts the remaining two years of royalties due under White's non-executory Contract into a pre-petition claim; that is, a contingent post-petition liability is not automatically or even exclusively converted into a pre-petition claim; therefore, White's Contract remained valid post-petition and was not disqualified as a property interest in the assets

sold, 4) once the Debtor elected to hold a non-plan sale pursuant to §363(b), something in §363(f) must work to convert White's property interest into a claim attaching to sale proceeds, and nothing does; therefore, White's Contract survived the sale and was entitled to specific performance, thereby activating the assignment clause within White's Contract, which transfers the Debtor's liability under White's Contract to the Buyer, 5) a stockholder must abide by the "absolute priority rule" in a contested non-plan sale when "taking" a creditor's interest in the assets sold if the sale is to be conducted according to an "equitable proceeding" as required under §363(f)(5) and the sale is to provide "adequate protection" of a creditor's interests and rights as required under §363(e), 6) a creditor may seek to establish and protect his property interest in the debtor's assets "at any time" according to §363(e), even after those interests and assets are sold via an expedited non-plan sale; especially when the Buyer failed its "good faith" finding and §363(m) does not moot such a challenge.

Finally, White challenges the Bankruptcy Court's injunction [14] which prohibits White from filing further motions in the Bankruptcy Court. The Bankruptcy Court ruled that White's Motion to Vacate and White's Motion for Administrative Priority were both frivolous. The Bankruptcy Court relied on its inherent powers to enjoin White;

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[14] PA, pgs. 22 - 23.

however, the Bankruptcy Court's pre-filing injunction violates several provisions in both case law and statutory law for issuing pre-filing injunctions. Namely, the Bankruptcy Court did not issue an order to show cause or hold a hearing prior to issuing its injunction, in clear violation of the procedure for issuing pre-filing injunctions established in ***Cok v. Family Court of Rhode Island*, 985 F.2d 32 (1st Cir.1993)**. Additionally, the Chapter 7 Trustee's request for the injunction was combined with the Trustee's opposition to White's 60(b)(4) Motion to Vacate, when Federal Bankruptcy Rule 9011(c)(1)(A) requires a request for sanctions to be filed separately from any other motion.

FACTS AND HISTORY

White sold his NURBS [15] and ACIS ™ [16] based surface and solid modeling software products and computer source code to the pre-petition

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[15] NURBS (Non-uniform Rational Bezier Spline) surface modeling code is a numerical system of computer algorithms for modeling and manipulating complex surfaces found in the automotive, aerospace, and consumer products industries. These CAD algorithms perform such operations as creation, intersection, and projection of points, curves, and surfaces onto and with other surfaces.

[16] ACIS is a library of solid modeling algorithms owned by and licensed from Spatial Corporation, a wholly owned subsidiary of Dassault Systems from France. Solid modeling is a system of defining and manipulating geometric volumes defined by the combination of primitive shapes such as: cubes, cylinders, spheres, cones, torii, and complex surfaces.

Debtor, Baystate Technologies, Inc. – d.b.a. CADKEY Corporation, in 1998 through an Asset Purchase Agreement (the Contract). In that Contract the Debtor agreed to pay White a 2.5% royalty for the next seven (7) years based on its gross revenue generated from the sale of the Debtor's products containing surface and solid modeling technology the Debtor purchased from White [17].

White did not take a security interest back in his technology, nor structure the Contract as a loan, nor was the Contract written as a licensing agreement. White sold his property outright to the Debtor who took immediate possession and ownership of White's intellectual property and the Debtor immediately integrated White's computer code into the Debtor's CAD (Computer Aided Design) product. However, Section 1.02 of the Contract does stipulates that the royalty payments due under the Contract represents a reservation of White's interest in his property[18].

The Debtor did not make a down payment toward the purchase of White's property, nor were any minimum payments required or ever paid under the Contract, nor did White receive payment for his property from any other source, like stock, other than royalties on products sold by the Debtor containing technology the Debtor purchased from

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17 PA, pg. 29, White's Contract - Sec. 1.04.

18 PA, pg. 29, White's Contract - Sec. 1.02(b).

White.

The Debtor made royalty payments to White every quarter for five (5) years prior to the petition date, with a brief forbearance granted by White for two (2) consecutive quarters a year prior to the Debtor's petition for bankruptcy in order to allow the Debtor to restructure its other debts. When the Debtor petitioned for Chapter 11 protection on August 22, 2003, there were nine (9) quarters of software sales and royalty payments remaining to be performed by the Debtor under White's Contract, and the next regularly scheduled quarterly royalty payment under the Contract was due on November 1, 2003 [19], nine (9) weeks after the petition date.

White's unpaid pre-petition royalties are based upon pre-petition sales in the quarter prior to the petition date, and the Debtor has never disclosed the amount of those royalties to White. However, White's unpaid post-petition royalties are known and calculate to be approximately 37,500 [20] according to revenue disclosures made

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[19] PA, pg. 29,White's Contract - Sec. 1.04 (a). White's Contract stipulates that royalty payments are due 30 days after the end of each calendar quarter.

[20] Trustee's Avoidance Recovery Action against White, related case No. 04-4525, docket # 1, exhibits attached thereto are the Debtor's records of quarterly royalties paid to White by wire transfer within 90 days of the petition date. Since White's royalty represents 2.5% of the Debtor revenue, these royalty payments of $18,655.81 during the quarter

by the Debtor during bankruptcy [21], and those royalties were all generated post-petition by the Debtor [22] prior to the Debtor selling its assets to the Buyer [23].

All the parties (Buyer, Chapter 7 Trustee [24], and White) now agree that White's Contract is non-

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prior to the petition date show that the Debtor earned approximately $746,200 in the calendar quarter pre-petition, and about the same per quarter post-petition according to the Debtor's post-petition revenue disclosures - see footnote 21 below.

[21] Bankruptcy Court docket #158 - Debtor's Cash Collateral Agreement with the single secured creditor. The agreed budget attached thereto shows over $1,000,000 in post-petition revenue; however, not shown is over $500,000 in accounts receivable pending at the closing of the sale.

[22] White does not claim that the small amount of unpaid pre-petition royalties deserve administrative priority, nor has the debtor ever informed White what those royalties calculated to be. White recognizes that any unpaid pre-petition royalties due under his Contract represent a general unsecured pre-petition claim pursuant to §101(5), §502, §503, and §726.

[23] The sale closed on December 3, 2003, after which White contends the Buyer and not the Debtor owed White royalties. Four (4) months of unpaid royalties were generated by the post-petition Debtor prior to the sale and total approximately $37,500, based on the Debtor's post-petition revenue of $1,000,000 and over $500,000 in accounts receivable sold as assets which normally would have generated a royalty for White, see Buyer's Purchase Agreement, Bankruptcy Court docket #105, pg. 2, pp. 1.1.10.

[24] The Debtor converted from Chapter 11 to a case under Chapter 7 of the Bankruptcy Code on March 14, 2004 – Bankruptcy Court docket 239.

executory [25, 26]; however, the Debtor and Buyer categorized White's Contract to be executory prior to and after the non-plan sale. For example, the Buyer declared to assume White's Contract four (4) days prior to the non-plan sale [27] and the Debtor then moved to reject White's non-executory Contract two (2) months after the sale [28], even though assumption and rejection are reserved for executory contracts only according to §365(a).

On the petition date, August 22, 2003, the Chapter 11 Debtor entered into a purchase agreement with IMSI, who became the Stalking Horse, and who agreed to bid for substantially all the Debtor's assets in a non-plan sale [29]. In response, the Debtor's largest investor, Kubotek, a publically traded corporation in Japan, who owns 17.5% of the Debtor's stock, filed a competing purchase agreement on October 16, 2003 [30]. At

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[25] Bankruptcy Court docket # 774 - Trustee's Opposition to White's Administrative Expense Application, pg. 3, pp. 8 & fn. 2.

[26] Bankruptcy Court docket # 782 - Transcript Motion to Vacate Hearing, April 25, 2006, pg. 14, ln. 22.

[27] Bankruptcy Court docket # 105 - Buyer's Bid & Purchase Agreement, Schedule 1.1.12 attached thereto, "Assigned Contracts" list.

[28] Bankruptcy Court docket # 230 - Debtor's Motion to Assume and Reject Contracts pg. 7 - 8, pp. 17, and Exhibit B attached thereto.

[29] Bankruptcy Court docket # 25- Debtor's Sale Motion, IMSI Purchase Agreement attached thereto as Exhibit A.

[30] Bankruptcy Court docket # 105 - Buyer's Bid & Purchase Agreement.

the auction, held on October 27, 2003, neither buyer increased their bid, therefore Kubotek was declared the winning bidder with the highest purchase agreement offer. However, Kubotek was found to have committed perjury when testifying and could not secure a "good faith" finding and declined to accept the assets [31]. The only other bidder at the auction, IMSI, who was the Stalking Horse, also declined to accept the assets after winning the bidding by default with the next highest bid and withdrew from the sale; therefore the auction ended without a winner. Ten (10) days later, on November 6, 2003, the perjurious stockholder returned to Bankruptcy Court with new conditions for the Sale Order [32] and agreed to close the sale (Kubotek is the "Buyer" previously and hereafter referenced).

On October 16, 2003, just four (4) days prior to the first day of sale hearings, the Buyer notified White that the Buyer intended to assume White's Contract [33]. The Buyer placed White's Contract

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[31] Bankruptcy Court docket # 245, - Transcript Oct. 27, 2003 Sale Hearing, pg. 48 : ln. 4 – pg. 52 : ln. 9.

[32] The new conditions for the sale were that, Bowers (the largest unsecured creditor) would accept $750,000 outside the bankruptcy as settlement of his pending District Court Injunction against the Debtor (see Bankruptcy Court docket #244 - Transcript October 30, 2003 Sale Hearing, pg. 3, ln. 12), and, the estate would fund $250,000 of the sale proceeds toward any appeal of the Sale Order by White (see Bankruptcy Court docket # 243 - Transcript November 6, 2003, Sale Hearing, pg. 6, ln. 12 - 25).

[33] Bankruptcy Court docket # 105 - Buyer's Bid & Purchase

on its "Assigned Contracts" list attached to its purchase agreement which the Buyer filed with the Bankruptcy Court and served on creditors, including White.

On the last day of sale hearings, held three (3) weeks later, on November 6, 2003, the Debtor and Buyer removed White's Contract from the final "Assigned Contracts" list attached to the Sale Order [34] which was endorsed by the Bankruptcy Court. Two (2) months later, on January 9, 2004, the Debtor and the Buyer notified White they were rejecting his Contract [35] even though the Debtor continued selling software permitted under White's Contract during the bankruptcy, up to the closing of the sale on December 3, 2003, without paying White his royalty.

White immediately appealed the Sale Order, filing pro se after his attorney resigned. White challenged whether the Debtor used good business judgment in selling all its assets for 28% value. However, since the Debtor and Buyer had not rejected White's Contract at the time of White's first appeal, White did not litigated nor appeal the status of his property interest in the assets sold.

Agreement, Schedule 1.1.12 attached thereto, "Assigned Contracts" list.

[34] Bankruptcy Court docket # 121, - Sale Order, Assigned Contracts attached thereto as Exhibit A.

[35] Bankruptcy Court docket # 230 - Debtor's Motion to Assume and Reject Contracts, Exhibit B attached thereto – Contracts to be Rejected = FastSURF Inc.

The District and Circuit Courts dismissed White's appeals, affirming the Sale Order, and this Court denied certiorari in case no. 05-8146.

ARGUMENT

The Bankruptcy Code Does Not Allow a Buyer To Take a Creditor's Property Interest Via an Non-Plan Sale Without Adequate Protection or Justification Under §363(f)

While the US Constitution vests authority in Congress to provide for bankruptcy relief, and such relief often entails paying creditors less than they are owed for their claims, any taking of an interest in property from a creditor must find clear statutory support in the Bankruptcy Code. As summarized by this Court in ***Hanover National Bank v. Moyses*, 186 U.S. 181, 188 (1902)**, bankruptcy regulations must adhere to the US Constitution:

> Congress may prescribe any regulations concerning discharge in bankruptcy that are not so grossly unreasonable as to be incompatible with fundamental law, ...

However, in ***Continental Illinois Nat'l Bank & Trust Co. v. Chicago, R.I. & P. Ry.*, 294 U.S. 648, 673–75 (1935)**, this Court recognized that bankruptcy powers are limited:

> But, while it is true that the power of Congress under the bankruptcy clause is not to be limited by the English or Colonial law in force when the Constitution was adopted, it does not follow that the power has no limitations.

Additionally, in ***Louisville Joint Stock Land Bank V. Radford*, 295 U.S. 555 (1935)**, this Court held that "the bankruptcy power, like the other great substantive powers of Congress, is subject to the Fifth Amendment".

The question is then what specific section of the Bankruptcy Code allowed the Debtor to transfer White's contractual interest in the Debtor's assets to the Buyer without adequate protection or just compensation, and what specific section of the Bankruptcy Code converted the remaining two (2) years of White's non-executory Contract to a pre-petition claim?

White's Contract Is Not Executory

11 U.S.C. §365(a) allows the debtor to assume or reject executory contracts and §502(g) converts damages caused by the rejection to a pre-petition claim; however, the Bankruptcy Code leaves non-executory contracts intact and valid post-petition. According to ***In re Stewart Foods, Inc*., 64 F.3d 141 (4th Cir. 1995)**, non-executory contracts cannot be assumed or rejected.

> § 365 applies only to executory contracts, a debtor-in- possession does not have the option of rejecting or assuming non-executory contracts and remains bound by the debtor's obligations under those contracts after the bankruptcy filing.

The United States House of Representatives Report No. 95-595, 95th Cong., 1st Sess. 347 (1977) attempted to define the concept of "executory" as:

> [t]hough there is no precise definition of what contracts are executory, it generally includes contracts on which performance remains due to some extent on both sides.

Additionally, in ***In re Spectrum Information Technologies, Inc.*, 190 B.R. 741, 748 (Bankr. E.D.N.Y.1996)** that Court established:

> where the only performance that remains is the payment of money, the contract will not be found to be executory.

At the core of these authorities lies the logic behind why the Bankruptcy Code allows the rejection of executory contracts. It is equitable to allow the debtor to breach an executory contract when the non-debtor is forgiven of his remaining duties as well. However, when the non-debtor has

no remaining duties to perform or forgive it is inequitable to forgive the debtor from performance of its duties, obligations, and liabilities.

White had performed his obligations in full under his Contract by delivering his source code to the pre-petition Debtor, at the inception of the Contract in 1998. The Debtor's remaining performance under the Contract was that of selling software and paying a royalty to White. Therefore, White's Contract was not executory, whereby the post-petition Debtor had no right to breach or reject White's Contract , and White's Contract was not invalidated by the bankruptcy.

In ***NLRB v. BILDISCO***, **465 U.S. 513, at 531**, this Court recognized:

> If the debtor-in-possession elects to continue to receive benefits from the other party to an executory contract pending a decision to reject or assume the contract, the debtor-in-possession is obligated to pay for the reasonable value of those services, Philadelphia Co. v. Dipple, 312 U.S. 168, 174 (1941), which, depending on the circumstances of a particular contract, may be what is specified in the contract, see In re Public Ledger, 161 F.2d 762, 770-771 (CA3 1947). See also In re Mammoth Mart, Inc., 536 F.2d 950, 954-955 (CA1 1976). Should the debtor-in-possession elect

> to assume the executory contract, however, it assumes the contract cum onere, In re Italian Cook Oil Corp., 190 F.2d 994, 996 (CA3 1951), and the expenses and liabilities incurred may be treated as administrative expenses, which are afforded the highest priority on the debtor's estate, 11 U.S.C. 503(b)(1)(A) (1982 ed.).

However, when the debtor-in-possession elects to exercise rights and "receive benefits" under a contract it makes no difference whether the contract is executory or non-executory, the debtor-in-possession still must fulfill its self-imposed liabilities under that contract, as demonstrated below.

Administrative Priority

As stated in ***In re FBI Distribution Corp.*, 330 F.3d 36 (1st Cir. 2003)** priority claims must benefit the estate and represent post-petition transactions :

> In general, for a claim to qualify as an administrative expense under subsection 503(b)(1), (1) it must have arisen from a transaction with the trustee or debtor in possession, rather than from a prepetition transaction with the debtor, and (2) the consideration supporting the claim must have benefitted the estate in

some demonstrable way.

And, as recognized in ***In re Mammoth Mart, Inc.*** **536 F.2d 950, at 955 (1st Cir. 1975),** entitlement to administrative priority depends on whether the transaction supporting the claim was initiated by the Debtor-in-possession:

> It is only when the debtor in possession's actions themselves– that is, considered apart from any obligation of the debtor – give rise to a legal liability that the claimant is entitled to the priority of a cost and expense of administration.

In our instant case, the Debtor alone elected to continue to exercise rights, enjoy benefits, and engage in transaction post-petition which were permitted under White's Contract. The Debtor-in-possession generated all of its $1.5 mil. in post-petition revenue and accounts receivable (prior to its non-plan sale) from selling software permitted under White's Contract. These transactions certainly benefitted the estate by allowing the Debtor to sell its business as a going concern.

Additionally, as stated in ***In re Commercial Financial Services, Inc.***, **246 F.3d 1291 (10th Circuit 2001)**, courts look to when the liability for the administrative claim occurred, not when the right to payment occurred:

> ...the liability must arise post-petition; it is not enough that the right to payment arose after the debtor in possession assumed control.

In our instant case White's unmatured "right" to payment of royalties arose when the Debtor and White signed the Contract pre-petition, in 1998. However, the Debtor's contingent "liability" to pay those royalties arose post-petition after the Debtor elected to continue selling software permitted under White's Contract. If the Debtor had not sold software post-petition permitted under White's Contract the Debtor would not have incurred a post-petition liability to pay White a royalty. Under the "liability/right" dichotomy articulated in ***In re Commercial Financial Services, Inc.***, White's post-petition royalties represent a valid administrative claim.

Ordinary Course of Business

In ***Reading Co. v. Brown***, **391 U.S. 471 (1968)**, this Court recognized that "costs ordinarily incident to operation of a business." fall within the Bankruptcy Code's general definition of administrative expenses and such expenses are afforded administrative priority under §503(b)(1) when they are "the actual, necessary costs and expenses of preserving the estate."

Courts analyze "ordinariness" according to a "horizontal" and "vertical" test, see ***In re Lavigne*, 114 F.3d 379, 384 (2nd Circuit 1997)**.

The horizontal test analyzes the ordinariness of the Debtor's transaction according to practices common in the Debtor's own industry. The vertical test analyzes the transaction in question according to the ordinariness of the Debtor's past business practices and according to those transactions in which creditors might reasonably expect the Debtor to engage. As stated in ***In re Lavigne***:

> The touchstone of 'ordinariness' is thus the interested parties' reasonable expectations of what transactions the debtor in possession is likely to enter in the course of its business.

See also ***In re Roth American***, **Inc. 975 F.2d, 949, at 953 (3rd Circuit 1992)**.

It is undisputed that the Debtor generated all of its $1.5 mil. in post-petition revenue and accounts receivable (prior to its non-plan sale) from selling software permitted under White's Contract and those software sales had always generated a royalty for White during the five (5) years pre-petition After paying White a royalty during each quarter for the five (5) years pre-petition it is clear that the Debtor paid White's contractually based royalties in the ordinary course of the Debtor's pre-petition business.

It is also clear from the Debtor's schedule of

debts and contracts [36] filed with the Bankruptcy Court that the Debtor contracted with numerous other software developers like White for inclusion of their intellectual property within the Debtor's products, all in the ordinary course of the Debtor's business. Every creditor should have reasonably expected the Debtor to continue paying White's royalty during bankruptcy in the Debtor's ordinary course of business. Accordingly, White's claim passes the horizontal and vertical tests for justifying payment as a priority administrative expense.

All the above cited precedents establish that White's Contract cannot be rejected or breached under the Bankruptcy Code by the Debtor-in-possession, and royalties due from the Debtor's post-petition sales of software permitted under White's Contract are entitled to priority status because those software sales were initiated at the sole discretion of the Debtor-in-possession, benefitted the estate, and were made in the ordinary course of the Debtor's business.

White's Contract Survives the Non-Plan Sale and Assigns to the Buyer

Because of the assignment clause in White's Contract, and because White's royalties attached to a specific set of the Debtor's assets, White's

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[36] Bankruptcy Court docket # 41, Debtor's Schedule G, containing certain executory contracts described as license agreements.

Contract representes an interest in the Debtor's property sold under §§363(b) & (f). Once the Debtor elected to hold a non-plan sale then §§363(f) and (e) governed the Debtor's assets and White's interest in them. Accordingly, White's request for declaratory relief to establish that his Contract survived the sale and assigns to the Buyer through specific performance under §363(f)(5) is nothing more or less than a request for "adequate protection" of his property interest which White is entitled to make "at any time" under §363(e). While the Bankruptcy Court ruled that White's Motion to Vacate was untimely, White's request for adequate protection of his Contract through specific performance is not time barred under §363(e) and can be requested "at any time", especially since the Buyer failed its "good faith" finding under §363(m).

The Debtor's remaining obligations under White's Contract, which became due during the two (2) years after the sale, survive the bankruptcy and assign to the Buyer through the assignment clause in White's Contract. The assignment clause in White's Contract mandates that:

> Section 10.05. Assignment. This Agreement shall be binding upon and inure to the benefit of the parties hereto and their respective successors and assigns, provided that this Agreement may not be assigned to any third party without the prior written consent of the other party;

> provided however that Purchaser may assign this Agreement in connection with the sale of substantially all of its business assets, or a transaction of substantially the same effect [37].

The non-plan sale was just such "a transaction of substantially the same effect" as "the sale of substantially all of its business assets"; therefore, White's Contract attaches to the Debtor's assets and assigns to the Buyer of those assets both inside and outside of bankruptcy.

White's Contract Represented A Property Interest in the Debtor's Assets Sold Pursuant to §363(f)

The First Circuit has noted, " 'interest in property' . . . is unequivalent to, and broader than, the term 'lien' ", see ***In re 229 Main Street Ltd. P'ship*, 262 F.3d 1, 7 (1st Cir 2001)** [38]. The BAP for the First Circuit has held, " [t]he phrase 'any interest' in §363(f) is meant to cover the same scope of interests for entities other than the estate as those encompassed in the definition of property of the estate.", see ***Ragosa v. Canzano (In re***

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[37] PA, pg. 45,White's Contract, Sec. 10.05

[38] The *229 Main Street* Court was referring to "interest in property" appearing in Bankruptcy Code §362(b)(3), however the BAP for the 1st Circuit held that "interest in property" defined by the *229 Main Street* Court applied equally to §363(f), see *Ragosa v. Canzano (In re Coarusso)*, 295 F.R. 166, 174 (BAP 1st Cir. 2003).

Coarusso), 295 F.R. 166, 174 (BAP 1st Cir. 2003). In order to facilitate non-plan sales the trend in the Circuits is to allow a broader interpretation of "interests in property" to include not only in rem interest but also "other obligations that may flow from ownership of property." 3 Collier on Bankruptcy 363.06[1](15th Ed. Rev. 203).

White's royalties represents just such an obligation flowing from the Debtor's purchase of White's intellectual property. Similarly, "interest in property" includes obligations to make payments to a benefit plan, see ***United Mine Workers of Am. 1992 Benefit Plan v. Leckie Smokeless Coal Co. (In re Leckie Smokeless Coal Co.)***, 99 F.3d 573, 585 (4th Cir. 1996), cert. denied 520 U.S. 1118 (1997). The general consensus in the Circuits is that §363(f) creates an interest in the property sold as long as the interest is connected to or arises from the property being sold and would under normal circumstances follow the property when sold, see ***In re Trans World Airlines, Inc.***, 322 F.3d 283 (3rd Cir. 2003). White's Contract and the assignment clause therein create just such an interest attaching to the property sold by the Debtor.

In ***Tennessee Student Assistance Corporation V. Hood***, 541 U.S. 440 (2004) this Court recognized that administration and discharge of a claim or interest via a §363 sale is an "in rem" proceeding:

The discharge of a debt by a bankruptcy court is similarly an in rem proceeding. See Gardner v. New Jersey, 329 U. S. 565, 574 (1947); Straton v. New, 283 U. S. 318, 320–321 (1931); Hanover Nat. Bank v. Moyses, 186 U. S. 181, 192 (1902); New Lamp Chimney Co. v. Ansonia Brass & Copper Co., 91 U. S. 656, 662 (1876). Bankruptcy courts have exclusive jurisdiction over a debtor's property, wherever located, and over the estate.

...

A bankruptcy court's in rem jurisdiction permits it to "determin[e] all claims that anyone, whether named in the action or not, has to the property or thing in question. The proceeding is 'one against the world.'" 16 J. Moore, et al., Moore's Federal Practice §108.70[1], p. 108–106 (3d ed. 2004).

...

And in Van Huffel v. Harkelrode, 284 U. S. 225, 228–229 (1931), we held that the Bankruptcy Court had the authority to sell a debtor's property "free and clear" of a State's tax lien. At least when the bankruptcy court's jurisdiction over the res is unquestioned, cf. United States v. Nordic Village, Inc., 503 U. S. 30 (1992), our cases indicate that the

> exercise of its in rem jurisdiction to discharge a debt does not infringe state sovereignty.

This precedent recognizes that the conversion of a encumbrance to a claim via §363(f) is an "in rem" proceeding .

11 U.S.C. §363(f)(1-5) Leaves White's Interest Intact

In a non-plan sale authorized under §§363 (b) or (c), one of the provisions in §363(f)(1-5) must work to convert a creditor's interest in the debtor's property to a claim attaching to the sale proceeds, which in turn authorizes the sale to be conducted free and clear of that creditor's interest. In our instant case the Sale Order purported to convert all encumbrances on the assets into claims [39]; however, the Sale Order failed to identify which provision in §363(f) converted White's interest into a claim, and none do. Therefore, the Bankruptcy Court overreached its statutory authority by converting White's interest in the Debtor's property to an unsecured claim via §363(f).

11 U.S.C. §363(f)(1) does not convert White's Contract to a claim because the Debtor's assets could not be sold free and clear of White's interest by way of some hypothetical non-bankruptcy proceeding. 11 U.S.C. §363(f)(2) does not impose

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[39] Bankruptcy Court docket # 121 – Sale Order, pg. 3, pp. F.

White's consent to the sale because White filed two (2) formal objections prior to the non-plan sale and did not consent to the sale then [40] [41], and does not consent now. In any event, the Buyer, Debtor, and Chapter 7 Trustee are judicially estopped from arguing that White consented to the sale because the Buyer and Debtor induced White into believing that his Contract was not at issue during the sale after the Buyer filed notice it was assuming White's Contract and then bid for the assets with White's Contract included. 11 U.S.C. §363(f)(3) is inapplicable to converting White's interest to a claim because White's Contract is not secured by a lien. 11 U.S.C. §363(f)(4) does not convert White's Contract to an unsecured claim because the Chapter 7 Trustee and Buyer both argue that White does not have an interest in the Debtor's assets [42] [43]. For there to be a "bonafide dispute" under §363 (f)(4), the party opposing White must argue that White has an interest in the assets sold, else that party cannot argue that §363(f) converts White's interest to a claim. Even if there was a bonafide dispute between the parties over White's alleged property interest in the assets sold, §363(e)

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[40] Bankruptcy Court docket # 38, White's Objection to the Bidding Procedures.

[41] Bankruptcy Court docket # 102, White's Objection to the Sale.

[42] Bankruptcy Court docket # 782 - Transcript Motion to Vacate Hearing, April 25, 2006, pg. 10 : ln. 2 - pg. 3 : ln. 2.

[43] Bankruptcy Court docket #755 - Buyer's Opposition to White's Motion to Vacate pg. 3, ln. 1.

allows White to establish and protect his property interest "at any time".

Finally, §363(f)(5) did not convert White's Contract to a claim. Normally, money damages are the remedy for a breach of contract; however, when the object contracted for is unique or the damages cannot be calculated with certainty, then specific performance is the remedy for breach of contract under Massachusetts law, see ***Ocean Spray Cranberries, Inc. v. PepsiCo, Inc.*, 160 F.3d 58 (1st Cir.1998)** stating:

> Still, injunctive relief requiring performance of a contract may ordinarily be granted (if other prerequisites are met) where monetary damages will not afford complete relief. A common example is agreements involving the sale of real property; specific performance is often granted because property is considered unique. See , e.g. , Walgreen Co. v. Sara Creek Property Co. , 966 F.2d 273, 278 (7th Cir. 1992). The same principle applies where harm caused by a breach, although economic in nature, is impossible to measure accurately. See Ross-Simons , 102 F.3d at 19.

In ***In re Haskell L.P.*, 321 B.R. 1 (Bankr. D. Mass. 2005)**, the Massachusetts Bankruptcy

Court ruled that under §363(f)(5) a landlord-debtor could not compel a sale free and clear of the tenant's leasehold interest because the tenant could not be compelled to accept a monetary satisfaction of its claim where the amount of damages could not be quantified with certainty. In such cases the Court ruled that specific performance is the only equitable remedy for the breach of a leasehold contract when damages cannot be calculated with certainty. The same consideration applies to White's Contract.

State law determines property rights in federal court unless a federal purpose mandates otherwise, see ***Butner v. United States*, 440 U.S. 48, 54-55, 99 S. Ct. 914, 918 (1979)**; and, federal preemption of state's rights is only appropriate when specifically expressed by a Federal Statute. Section 10.04 of White's Contract stipulates that Massachusetts Law governs his Contract [44]. Under Massachusetts law, Mass. Gen. Laws 214, § 1A, a contracting party enjoys the equitable remedy of specific performance to force the breaching party to carry out its contractual duties, see ***Poltorak v. Jackson Chevrolet Co.*, 322 Mass. 699, 700, 79 N.E.2d 285, 286-87 (1948)**.

At the time of the sale White's Contract was valid because it could not be rejected and did not convert to a pre-petition claim and the only way to

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[44] PA, pg. 45, White's Contract, section 10.04.

calculate the value of the two (2) years of royalties remaining due under White's Contract was for the Debtor or Buyer to pay those royalties based on actual sales. That is, specific performance is the only way to calculate the value of White's Contract because future product sales and royalties cannot be calculated with certainty. Given that specific performance leaves White's Contract intact, White's Contract assigns to the Buyer through its assignment clause.

11 U.S.C. §363(f)(5) Invokes the Absolute Priority Rule

Massachusetts Bankruptcy Courts have ruled that §363(f)(5) can compel a party of interest to accept money for their interest in the debtor's property if that party could be so compelled under a plan of reorganization. In ***In re Healthco Int'l., Inc.*, 174 B.R. 174 (Bankr. D. Mass. 1994)** the Court ruled that during a non-plan sale if the creditor's interest could be "crammed down" under a plan of reorganization, then §363(f)(5) was satisfied because a plan is just such an "equitable proceeding" anticipated under §363(f)(5). If Massachusetts Bankruptcy Courts accept that the "cramdown" provision of a plan of reorganization works to allow a non-plan sale under §363(f)(5), then the "absolute priority rule" must apply to a non-plan sale as well because adherence to the "absolute priority rule" is the statutory prerequisite for a "cramdown" under a plan of

reorganization. Therefore, when no other provision in §363(f) works to convert a creditor's interest in the debtor's assets to a claim, and the buyer is a stockholder, then §363(f)(5)'s requirement that an "equitable proceeding" govern a §363 sale also invokes the "absolute priority rule".

In our instant case a cramdown was not tolerable and a plan of reorganization could not be confirmed against unsecured creditors' objections because the Buyer was a stockholder who did not pay a fair market price for the assets or make senior creditors whole, as required under §1129(b)(2)(B)(ii). Even though §363(f)(3) only requires that the non-plan sale price exceeds the value of the liens, the absolute priority rule requires that a stockholder must pay a fair market price for the assets; or, the stockholder must make senior creditors whole, see ***Bank of America National Trust And Savings Association v. 203 North La Salle Street Partnership***, 526 US 434 (1999).

The Bankruptcy Court never reached a finding in its Sale Order that the price paid for the assets represented a fair market price according to the standard established for a stockholder in ***Bank of America National Trust And Savings Association***. This Court defined a fair price paid by a stockholder to be one in which the assets were exposed to the entire market and brought a fair market price. However, the sales agent hired to

advertise the Debtor's assets, Robert Schwartz, chose not to advertise the Debtor's assets to venture or financial capital [45] and only advertised to the Debtor's competitors [46], thereby exposing the assets to a limited market, and then only for the short period of six (6) weeks prior to the sale. In fact, the sales agent did not attract one bidder to the sale. The Stalking Horse entered into its purchase agreement on the petition date [47], weeks before the sales agent was hired to market the assets, and the only other bidder was the stockholder who testified it decided a month prior to the petition date that it would enter a bid [48]. The sales agent was completely ineffective in attracting even one bidder or in exposing the assets to the market at large.

The auction that did transpire was spoiled when both bidders rejected the assets and withdrew from the sale [49] after the stockholder committed perjury and failed to secure a good faith finding [50]. The standard under §363(f)(3) which

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[45] Bankruptcy Court docket # 245 - Transcript Oct. 27, 2003 Sale Hearing, pg. 64, ln. 17 - pg. 65, ln. 7 -.

[46] Bankruptcy Court docket # 245 - Transcript Oct. 27, 2003 Sale Hearing, pgs. 54 - 58.

[47] Bankruptcy Court docket # 121, - Debtor's Sale Motion, IMSI Purchase Agreement attached thereto as Exhibit A.

[48] Bankruptcy Court docket # 245 - Transcript Oct. 27, 2003 Sale Hearing, pg. 31, lns. 16 - 24.

[49] Bankruptcy Court docket # 245 - Transcript Oct. 27, 2003 Sale Hearing, pg. 52, ln.2 - 9 and pg. 68, ln. 5 - 22 -

[50] Bankruptcy Court docket # 245 - Transcript Oct. 27, 2003

the Bankruptcy Court used to establish that a fair price was paid only applies to determining if an outsider, like the Stalking Horse, paid a fair price. The same standard is not appropriate for establishing that a fair price was paid by a stockholder according to ***Bank of America National Trust And Savings Association***.

In our instant case the sales agent testified that the Debtor's assets were worth $8 mil. [51], and the Debtor testified its assets were worth $10 mil.[52] (for an average of $9 mil.). However the stockholder only paid $2.85 mil for the assets, which included over $500,000 in accounts receivable [53]. That means the stockholder only paid 28% of the value of the non-cash assets, which is a far cry from the definition of a fair price paid by a stockholder. The Court simply used the wrong standard when evaluating the fairness of the price paid for assets purchased by a stockholder at a non-plan sale.

The only statutory definition of "fairness and equity" appearing in all of the Chapter 11 codes is expressed as the absolute priority rule, which

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Sale Hearing, pg. 48 - 52.

[51] Bankruptcy Court docket # 245 - Transcript Oct. 27, 2003 Sale Hearing, pg. 63, ln. 9 - pg. 64, ln. 16.

[52] Bankruptcy Court docket # 243 - Transcript Nov. 6, 2003 Sale Hearing, pg. 21, ln. 17.

[53] Bankruptcy Court docket # 121 - Sale Order, pg. 3, ln. 2 – ln. 3.

should apply equally throughout Chapter 11 to cover both a plan of reorganization and a non-plan sale if both procedures are to be conducted fairly and equitably during Chapter 11. It is unfair and inequitable to let a stockholder dodge the reach of the absolute priority rule through a non-plan sale when senior creditors would never confirm the same sale under a plan of reorganization and when such a sale could not be crammed down against the objection of creditors, especially when the stockholder committed perjury when testifying about its arms length relationship and negotiations with the Debtor.

The Sale Order Is Void

A judgment is void and subject to relief under Federal Rule of Civil Procedure 60(b)(4) (hereafter "60(b)(4)") if the court's action amounts to a plain usurpation of power, see ***United States v. Boch Oldsmobile, Inc.*, 909 F.2d 657, 661 (1st Cir. 1990)**. A court may not render an order which transcends the limits of its authority. Furthermore, an order is void when it goes beyond the powers granted to the court by Congress, even where the court has jurisdiction over the parties and the subject matter. The lack of statutory authority to make a particular order or a judgment is akin to lack of subject matter jurisdiction and is subject to collateral attack. 46 Am. Jur. 2d, Judgments § 25, pp. 388-89. The Bankruptcy Court simply did not have the statutory authority necessary to convert White's Contract into an

unsecured claim through the non-plan sale. Additionally, according to ***Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306, 314 (1950)** the Sale Order is void because notice thereof via the Buyer's Purchase Agreement was not reasonably calculated to inform White of the true intentions of the Debtor and Buyer after they indicated they were assuming White's Contract immediately prior to the sale and then rejected White's Contract two (2) months after the sale.

The Sale Order is also void because it offends the conscience of justice. In ***Snyder v. Massachusetts*, 291 U.S. 97, 105 (1934)** this Court held that due process is violated "if a practice or rule offends some principle of justice so rooted in the traditions and conscience of our people as to be ranked as fundamental." The Sale Order is void and offends the principals of equity and justice because: 1) the Sale Order allowed a perjurious stockholder [54] to purchase all of the estate's $ 9

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[54] After committing perjury the Buyer withdrew from the sale and returned to Japan and did not attend the final day of the sale hearing to testify concerning its insider relationship with the Debtor or to litigate its limited objection to the sale in which the Buyer disclosed it owned portions of the Debtor software being sold - see Bankruptcy Court docket # 100 – Buyers Limited Objection to Sale, Software Development Agreement attached thereto as Exhibit A. The Buyer's objection to the sale and disclosure that it owned part of the software being sold created a deterrent against another buyer bidding for the assets, which explains why the Stalking Horse declined to bid at the auction or take the assets after winning

mil. in assets for only $ 2.85 mil. 2) in a direct sale to that stockholder rather than a fair market auction with competitive bidding, 3) when those assets were only selectively marketed for a short period of time, 4) leaving all of the $ 10 mil. in unsecured debt unpaid, 5) after Estate Counsel gorged on over $ 1 mil. in fees 6) which they promised as a dividend to creditors, 7) when no legal principal allowed such a sale to a stockholder unless consented to by creditors, 8) and instead of gaining that consent the Buyer required the estate to exhaust $250,000 of the only dividend available for creditors to indemnify the Buyer's perjury on appeal.

Fairness and equity dictate that if unsecured creditors are to be so totally decimated by this bankruptcy, getting nothing for their claims, then Estate Counsel and stockholders cannot deplete all the money and assets out of the estate while the Debtor's CEO maintains lucrative employment with the Buyer in exchange for facilitating such a windfall for all but unsecured creditors. "Our people" would be shocked and ashamed that such practices masquerade as justice. This bankruptcy provided nothing for unsecured creditors after all the assets were taken by the stockholder and all the cash was deplete by Estate Counsel. Surely this is not the Congressional intent behind the Bankruptcy Code.

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the bidding by default.

The sale served as nothing more than an expensive State Foreclosure Sale conducted under color of the Federal Bankruptcy system, being of no benefit to unsecured creditors, and was inapposite to the goal of the Bankruptcy Code which is to balance the equity between debtors and creditors.

White's 60(b)(4) Motion Was Ripe, Not Untimely

A 60(b)(4) motion may be brought at any time, see ***United States v. Boch Oldsmobile***, therefore, White's motion to vacate the Sale Order was not untimely per se. White's 60(b)(4) motion would normally be both moot and untimely under §363(m); however, the Buyer committed perjury at the auction and failed to secure a good faith finding and no one in this case is arguing that §363(m) bars White's 60(b)(4) motion.

White's 60(b)(4) motion is only limited in time by its reasonableness. Since §363(m) and the statute of limitations under Federal Rule 60(b) serve the same purpose of finality for good faith litigants, the Buyer's failure to secure those protections under §363(m) also foreclose a time bar to White's 60(b)(4) motion. It is not unreasonable to vacate the Sale Order, or in the alternative to order the Buyer to assume White's Contract when the Buyer gave notice it was assuming White's Contract in the first place.

White waited two and a half (2 & ½) years

after the sale to file his 60(b)(4) Motion because his initial appeal of the Sale Order was still pending and had not yet been denied by this Court. White did not sit on his rights, White diligently exercised his rights throughout this case. White had a motion, appeal, or writ pending every day of this case.

The Bankruptcy Court's Injunction Violates White's Right to Due Process

The Bankruptcy Court cites the four (4) prong procedure established in ***Cok v. Family Court of Rhode Island***, **985 F.2d 32, 34 (1st Cir. 1993)** for justifying a pre-filing injunction against a pro se litigant. Those prongs are: 1) The court must establish a sufficient record to support and justify the injunction, 2) The litigant must be warned of the injunction and be given an opportunity to oppose it, 3) There should be no reasonable alternative, and 4) The injunction must be narrowly construed so as to apply only to the problems identified by the Court. White addresses each of these criteria in turn.

1). Suffice it to say that if this Court finds that White's arguments on appeal regarding his Motion to Vacate or Administrative Expense Application are non-frivolous then the Bankruptcy Court's pre-filing injunction against White is without merit.

2). White was not given any warning of the

Bankruptcy Court's pre-filing injunction nor given an opportunity to oppose it. The Bankruptcy Court is required by case law and statutory law to issue an order to show cause and hold a hearing prior to issuing sanctions, which the Bankruptcy Court did not do.

3). The Bankruptcy Court had numerous alternatives to enjoining White. The Bankruptcy Court should have relied on its statutory power to sanction White under Federal Bankruptcy Rule 9011instead of enjoining White under the Court's inherent powers. The Bankruptcy Court's self-made procedure for enjoining White violates Rule 9011and did not provide White with the same standard of due process as Rule 9011. Rule 9011 requires the Bankruptcy Court to issue an order to show cause and hold a sanction hearing, as does the ***Cok v. Family Court of Rhode Island*** procedure, which did not occur in this instant case.

Additionally, it was the Chapter 7 Trustee who requested the injunction against White in the Trustee's opposition to White's Motion to Vacate [55], when such a request for sanctions must appear in a separate motion addressing only sanctions, according to Rule 9011(c)(1)(A). As a result, there is no record on appeal documenting White's response to an order to show cause or record of

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[55] Bankruptcy Court Docket # 750 - Trustee's Opposition to White's Motion to Vacate, pg. 8, pp. 18.

arguments at an injunction hearing.

4). The injunction is too broadly fashioned and amounts to a total ban against White filing even a meritorious pro se motion. First, the Bankruptcy Court's injunction has no provision for reviewing White's pro se filings before they are stricken by the clerk to determine which motions might be meritorious; therefore, even meritorious pro se motions filed by White are banned by the Bankruptcy Court. Second, the Bankruptcy Court requires White to file through an attorney and then threatens to sanction any attorney White hires to litigate his administrative claim or property interest [56]. No attorney in Massachusetts would represent White under such a threat. This threat created a filing restriction in the injunction with which White could not possibly comply, thereby violating White Constitutional Right "to petition the government for a redress of grievances".

Summary

The Debtor paid White's royalties during the five (5) years pre-petition in the ordinary course of the Debtor's business. White's Contract remained valid after the petition date and the Debtor alone chose to continue selling software permitted under White's Contract, in the Debtor's ordinary course of

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[56] Bankruptcy Court docket # 782 - Transcript Motion to Vacate Hearing, April 25, 2006, Judge Boroff's closing remarks, pg. 16, Lns. 1-3.

business, which benefitted the estate, therefore White is entitled to priority of his administrative claim. The mistake by the Bankruptcy Court in categorizing White's royalties as a pre-petition claim caused the Bankruptcy Court to disregard White's property interest in the Debtor's assets, allowing the Buyer to "take" White's property without proper notice or just compensation. However, once the Debtor elected to sell all its assets through a non-plan sale then the provisions in §363(f) governed the Debtor's assets and White's interest in them and required that specific performance was the remedy for the Debtor's breach of White's Contract because damages could not be calculated with certainty.

Accordingly, specific performance requires that White's Contract assigns to the Buyer through its assignment clause. Furthermore, §363(f)(5) allows a contested non-plan sale if such a sale could be "crammed down" under a plan of reorganization, which means the absolute priority rule is applicable to Chapter 11 non-plan sales and requires a stockholder of the Debtor, such as the Buyer, to pay a fair market price for the assets, or make dissenting senior creditors whole. Finally, once the Buyer notified White that the Buyer was assuming White's Contract four (4) days prior to the sale, and then the Debtor and Buyer rejected White's Contract two (2) months after the sale, such faulty notice violated White's right to due process, which in turn voids the application of the Sale Order in regards to White's property interest.

Therefore, White's Contract survives the bankruptcy and assigns to the Buyer.

The meritorious consequence of these arguments is a compelling demonstration that the Bankruptcy Court's pre-filing injunction against White is unwarranted and should be vacated.

White's Writ Should Be Granted

White's Writ of Certiorari should be granted because Federal Bankruptcy, District, and Circuit Courts consistently (and incorrectly) categorize non-executory contracts as automatically converting to pre-petition claims, exempt from administrative priority and disqualified as a property interest in the debtor's assets without evaluating the terms of those contracts on a case by case basis. There is nothing in the Bankruptcy Code, except the self-made rules practiced by the lower Courts, which leads to the conclusion that non-executory contracts automatically and exclusively "default" into unsecured pre-petition status, exempt from qualification under §503(b)(1(A) and §363(f).

Respectfully submitted on this 9th day of November 2007, by

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